

**Senator Grassley's Questions for Mary L. Smith, Nominee to be Assistant Attorney General, Tax Division, U.S. Department of Justice**

1. Why do you want to head the Tax Division of the Justice Department?

**The Tax Division is one of the premier litigating divisions in the Department of Justice, and the Tax Division holds a central place in the nation's tax litigation system. If confirmed, I will be thrilled to make a contribution to this important mission. I have a strong sense of public service from my time both as a career trial attorney at the Department of Justice and from my roles in the White House, both in the Domestic Policy Council and the White House Counsel's Office. When I was a trial attorney at the Department of Justice, I took my responsibility seriously to represent the United States and to protect taxpayer funds. I am honored to be nominated to head the Tax Division, and I feel the Division has some of the best attorneys in the Department of Justice. I am excited to be a part of the tax enforcement system, and I feel that my extensive litigation background, particularly in complex financial litigation, will serve me well if I am so fortunate to be confirmed as the Assistant Attorney General for the Tax Division.**

2. How and why does your experience uniquely qualify you to head the Tax Division of the Justice Department?

**At its heart, the Tax Division is a litigating division in the Department of Justice. I have extensive litigation experience across a range of sectors – for the government, in a private law firm, and as in-house counsel. I understand first-hand the work of the Justice Department's career trial attorneys, having been a career attorney in the Civil Division. I understand how the Department of Justice works, both from my time there and from my extensive interactions with the Department on policy and budget matters when I was in the White House. I have extensive experience with the federal budgeting process from my time in the White House, where I interacted almost daily with persons in the Office of Management and Budget. In addition, for the last several years, I have concentrated my practice on complex financial litigation that involved accounting and securities issues. I have dealt with tax issues, both while at the White House and at Tyco. I believe that I can give a fresh eye to the tax issues litigated by the Tax Division if I am so fortunate to be confirmed to be the Assistant Attorney General for the Tax Division.**

3. What is your tax legal experience? Please identify any and all legal work you have performed that involved tax issues. Please provide specifics of the tax work you did.

**While in the White House, I worked closely with the National Economic Council regarding legislation that would put tribal governments on par with state and local governments under the Federal Unemployment Tax Act (FUTA). I spent many months working with the Treasury Department, Congressional leaders, and the National Economic Council on addressing this**

disparity in tax policy between tribal governments and state governments. The end result was that the FUTA language was included in the final FY 2001 omnibus appropriations bill.

While serving as in-house counsel at Tyco, I dealt with a number of tax issues. I interacted with the Tyco tax department on a variety of issues, including the tax treatment of several items including those involving theft loss and charitable contributions. *See, e.g.,* 26 U.S.C. §§ 165 and 170. I also worked with the tax department on issues which dealt with the tax treatment of certain items arising from corporate acquisitions, as well as the proper classification of acquisition expenses. *See, e.g.,* 26 U.S.C. § 269. I advised the tax department on responding to IRS subpoenas. In addition, two of the Company's Senior Vice Presidents of Tax were either witnesses or potential witnesses in the multi-district securities litigation for which I was responsible. One of the former heads of Tyco's tax department, R. Scott Stevenson, ultimately pled guilty to failing to report more than \$170 million in U.S. income on Tyco's tax returns and was sentenced to three years in prison. Additionally, I interacted with the tax department on issues involving state tax payments for various former senior executives. Finally, I interacted with the tax department regarding the approximately \$3 billion settlement of the Tyco securities litigation and issues involving its tax treatment. *See, e.g.,* 26 U.S.C. § 162.

4. In your opinion, what areas of the tax laws are you the most knowledgeable?

**I believe that I have a broad-based general knowledge of tax issues which will serve me well, given the myriad of issues in which Tax Division is involved.**

5. Do you believe that your tax experience favorably compares to previous Assistant Attorney Generals for the Tax Division at the Justice Department? Why?

**The Tax Division of the Department of Justice is a litigating division of the Department and serves as the enforcement arm of the Internal Revenue Service (IRS). The Tax Division does not make tax policy; it merely enforces existing law. I have spent my career as a litigator and a trial attorney, focusing on complex financial matters and securities enforcement matters. Since the division is the enforcement arm of the IRS and as a litigating component, I believe that I can quickly assimilate the facts and law in litigation handled by the Tax Division and would use these skills that I have honed throughout my years as a litigator and trial attorney, if I am so fortunate to be confirmed to be the Assistant Attorney General for the Tax Division. In fact, Nathan J. Hochman, the most recent Assistant Attorney General for the Tax Division, has supported my nomination, stating that he is confident that I "will provide strong leadership for the Division and [I am] a good choice for the position."**

6. Have you ever given any speeches or presentations on tax law or tax issues?

**I have not given any speeches or presentations on tax law or tax issues.**

7. Have you written any law reviews or articles on tax law or tax issues?

**I have not written any law reviews or articles on tax law or tax issues.**

8. Have you participated in any tax law conferences or CLEs?

**I have not participated in tax law conferences or CLEs, but I expect to participate on a going-forward basis.**

9. What kind of tax issues and problems are you particularly interested in?

**I am interested in enforcing the tax laws fully, fairly, and consistently. If I am confirmed, my top priorities for the Tax Division will include improving coordination with the IRS, the Treasury Department and U.S. Attorneys Offices across the country; rooting out tax fraud and abuse; combating offshore tax avoidance; increasing international enforcement along with the IRS; ensuring that the Tax Division maintains the highest ethical standards; and ensuring that there is fair and uniform enforcement of the tax laws.**

10. Have you ever worked on cases with the Tax Division of the Justice Department?

**I have not worked on cases with the Tax Division of the Justice Department.**

11. Have you ever worked on cases with or before the Internal Revenue Service?

**I have not worked on cases with or before the Internal Revenue Service.**

12. Are you familiar with the cases that the Tax Division is currently working on?

**Through public reports, I am familiar with some of the cases in which the Tax Division is currently engaged.**

13. Are you familiar with the tax standards and guidelines utilized by the Tax Division?

**Yes, I am familiar with the tax standards and guidelines utilized by the Tax Division.**

14. What do you see as the greatest challenges for the Tax Division of the Justice Department?

**Stopping the spread of tax shelters and increasing international enforcement, two of my priorities, are among the greatest challenges for the Tax Division. If I am confirmed, I will use the Tax Division's resources in a way that best promotes the Division's mission to enforce the nation's tax laws fully, fairly and consistently.**

15. Are there any areas of improvement for the Tax Division that you are going to pursue if you are confirmed?

**I believe that the Tax Division is doing a good job of enforcing the tax laws fairly and consistently. I understand that each year, the Tax Division has about 7,000 civil cases in process, handles several hundred civil appeals, and most recently, has authorized between 1,300 and 1,800 prosecutions each year. In addition, in FY 2008, the Tax Division directly saved the Government approximately \$1 billion without taking into account the billions it saved by the legal precedent it set. I will strive to improve coordination with the IRS, the Treasury Department, and the U.S. Attorney's Offices as well as to try to improve international enforcement efforts.**

16. If you are confirmed, what will be your priorities for the Tax Division?

**If I am confirmed, my top priorities for the Tax Division will include improving coordination with the IRS, the Treasury Department and U.S. Attorneys Offices across the country; rooting out tax fraud and abuse; combating offshore tax avoidance; increasing international enforcement along with the IRS; ensuring that the Tax Division maintains the highest ethical standards; and ensuring that there is fair and uniform enforcement of the tax laws.**

17. If you are confirmed, what kind of relationship will you foster for the Tax Division with the Internal Revenue Service?

**If I am confirmed, I will strive to foster an open and cooperative relationship with the Internal Revenue Service.**

18. What kind of management experience do you have?

**I have management experience from both my time at Tyco and at Skadden. At Tyco, I was responsible for the one of the largest litigation matters pending in the country – the multi-district class action securities litigation arising out of the acts of former Tyco management. At any given time, there were over 40 outside counsel and over 60 contract attorneys working on this matter. I supervised all of the outside counsel and gave specific assignments to each of Tyco's outside law firms, and, in many instances, to particular attorneys at those law firms. As for the contract attorneys, prior to my arrival at Tyco, no one had a handle on all the projects at the contract review center and how many attorneys were working on each project. I instituted a process whereby on a regular basis we reviewed all the projects and the number of attorneys working on certain projects. Based on these reviews, during certain periods, I made the decision to substantially reduce the number of contract attorneys. At Tyco, I also managed an over \$50 million budget and I have extensive budgeting experience.**

**At Skadden, I often supervised large teams of lawyers and legal assistants during government investigations and civil litigation. I regularly taught the younger attorneys how to perform certain tasks and reviewed their work. I worked to motivate the younger attorneys by spending time with them and explaining to them how their work fit into the overall plan and strategy for the case or investigation. We often worked long hours and under tight deadlines, but I worked to ensure that all the persons on the team felt that their work was important and appreciated.**

19. Do you think that IRS Criminal Investigations should be permitted to work directly with US Attorneys instead of having DOJ Tax approval in most cases?

**The Tax Division was created in 1933 by President Franklin Delano Roosevelt to centralize the supervision of federal tax litigation because the previous arrangement had produced conflicting positions. I believe that the Tax Division has served this function well for the government and for taxpayers. It is this coordination and review function by the Tax Division which provides for consistent enforcement of the tax laws and instills public confidence in our tax system. Because the Division independently reviews the merits of tax cases that the Internal Revenue Service requests be brought or defended, it is able to ensure that the government takes litigating positions that are consistent with applicable law and policy while best promoting voluntary compliance.**

20. What amount of time do you think is appropriate for IRS CI agents to spend on assisting Justice Department prosecutions that are not tax-related? What benefit does the Justice Department derive from using such assistance when such resources may be better used for tax enforcement? Aren't we robbing Peter to pay Paul by using resources for non-tax issues?

**Since I am not at the Department of Justice, I do not have specific knowledge about this issue. However, if confirmed, I will review the use of these resources.**

21. Do you believe that dual purpose summons are appropriate?

**Yes, the Supreme Court has ruled the Internal Revenue Service is not required to serve a John Doe summons when, during an investigation of a known taxpayer's liability, it serves one summons to obtain information that may be relevant to the known taxpayer's liability and to ascertain the identities of other taxpayers that may not be in compliance with the revenue laws.**

22. Due to the controversy surrounding the use of the term "tax protester", the most recent Assistant AG for Tax coined the term "tax denier". Do you agree with this terminology and do you expect to use it?

**The most recent Assistant AG, Nathan Hochman, used the term “tax defier” to refer to a person “who rejects the fundamental basis, the legal underpinnings of our entire tax system, and flies in the face of legal precedent going back decades that has upheld the Constitutional and statutory validity of that system.” I think the terminology is a fair use of the problem it seeks to address. And, I do expect to use it, as the Tax Division in April 2008 launched the National Tax Defier Initiative to reaffirm and reinvigorate the Tax Division’s commitment to investigate, pursue and, where appropriate, prosecute those who take action to defy and deny the fundamental validity of the tax laws.**

**23. What changes would you suggest to the civil injunction program to combat abuse by preparers?**

**I understand that since 2000, the Tax Division has obtained injunctions against more than 400 tax-fraud promoters and return preparers. These numbers represent a dramatic increase over the 1990’s, when the total number of promoters and preparers enjoined was less than 25 for the entire decade. While much has been accomplished, much remains to be done. If confirmed, I plan to work with the IRS to encourage them to keep sending referrals and to coordinate trainings to help agents and Chief Counsel attorneys learn about the injunction process and how to conduct an investigation that leads to a successful injunction referral.**

**24. Do you think the current number of such injunctions has a sufficient deterrent effect?**

**I understand that since 2000, the Tax Division has obtained injunctions against more than 400 tax-fraud promoters and return preparers. These numbers represent a dramatic increase over the 1990’s, when the total number of promoters and preparers enjoined was less than 25 for the entire decade. The schemes the Division has enjoined during the past several years cost the Federal Treasury more than \$2 billion, and placed an enormous administrative burden on the IRS. If permitted to go unchecked, these schemes would undermine public confidence in the integrity of our tax system, and require the IRS to devote substantial resources to detecting, correcting, and collecting the resulting unpaid taxes. While there has been a significant deterrent effect from these efforts, much remains to be done.**

**25. What role should the DOJ Tax Division have in distinguishing aggressive tax planning from obstruction of justice, i.e., KPMG and UBS?**

**Since I am not in the Department, I do not have specific knowledge of particular cases. The role of the Tax Division is to enforce the tax laws fairly and consistently. In keeping with that role, the Division independently reviews the merits of tax cases that the IRS requests be brought or defended, and ensures that the government takes litigating positions that are consistent with applicable law and policy while best promoting voluntary compliance. Accordingly, the role of the Tax Division is to evaluate the law and the facts in every case and to take a position that is consistent with applicable law.**

26. How would you coordinate the activities of the Southern District of New York and other U.S. Attorneys' offices that are outside the direct supervision of the AAG for Tax? Do you think the tax function of the Southern District of New York should be placed under the supervision of the AAG for Tax?

**In the Tax Division, the Deputy Assistant Attorney General for Criminal Matters and the Deputy Assistant Attorney General for Civil Matters, along with the experienced attorneys in the criminal and civil enforcement sections, work closely and cooperatively with the Assistant United States Attorneys in the Southern District of New York in both criminal and civil matters. Just like with other U.S. Attorneys Offices, the Division often provides litigating assistance to the Southern District of New York. Given the cooperative and productive relationship, I would not seek to change the structure.**

27. What is your view of the Cheek defense? Do you believe that willful ignorance should ever be a defense to a criminal charge?

**In *Cheek v. United States*, 498 U.S. 192 (1991), the Supreme Court held that a tax defier's belief that he was not violating the federal tax laws based on a misunderstanding caused by the complexity of the tax law itself – if a genuine, good faith belief – would be a valid defense to charges of tax evasion. The Court also ruled that a belief that the tax law is invalid or unconstitutional is not based on a misunderstanding caused by the complexity of the tax law, and is not a valid defense. The Tax Division's role is to enforce the laws not make the laws. So I will adhere to applicable Supreme Court precedent.**